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Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM A. CAPRIOLA, JR. and
BRYN G. CAPRIOLA, H/W

Petitioners

v.

B. F. GOODRICH COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

May Federal Rule of Evidence 607 be used as a vehicle to introduce hearsay testimony by calling a witness for the sole purpose of contradicting him with the hearsay.

Does not Rule 104 and Rule 403 of the Federal Rules of Evidence mandate a preliminary finding of fact that the proferred hearsay testimony has a probative effect not outweighed by its prejudice.

It is a denial of Constitutional due process for the appellate court to deny the ground for appeal on the grounds that the record does not support counsel's objections which reason is in error and brought to the Court's attention on a Petition for Rehearing and the Petition for Rehearing is denied without any action or review by the Court of its error.

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The Petitioners, William A. Capriola, Jr. and Bryn G. Capriola, his wife, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of

Appeals for the Third Circuit entered in this proceeding on December 16, 1987. The Opinion of the Court of Appeals for the Third Circuit is not reported. The Opinion appears in the Appendix hereto. No Opinion was rendered by the Eastern District of Pennsylvania. The Order of that Court appears in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on December 16, 1987. A Petition for Rehearing was filed timely and was denied on January 12, 1988. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

FEDERAL RULES OF EVIDENCE PROVISIONS INVOLVED

Rule 607: The credibility of a witness

may be attacked by any party, including the party calling him.

Rule 104: (a) **Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of Jury.** Hearing on the

admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other prelimninary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) **Testimony by Accused.** The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) **Weight and Credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 613(a): **Examining Witness Concerning Prior Statement.** In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

STATEMENT OF THE CASE

The husband/petitioner, William A. Capriola, Jr., who was twenty-three years of age at the time of the accident had been basically educated in technical schools and then began working with his father in the auto body and fender trade. In 1979 he started his own business in Phoenixville,

Pennsylvania, and in addition to maintaining an auto body shop, he did towing service and paint work and sold used auto parts. When his business began to taper off, he closed the place in Phoenixville and received a job offer from his uncle to work with his father at Conestoga Auto Body in Berwyn, Pennsylvania.

He moved all his machinery and gear to his father's place on King Road in Spring City, Pennsylvania, utilizing the barn there for finishing jobs. He was due to start work for his uncle on May 1, 1985.

On April 30, 1985, he was working in the barn with his father when Jeff Weaver came by. He was a business acquaintance and friend of William Capriola, Jr. (hereinafter referred to as "Billy"). He

needed some tires changed (86a) and knew that Billy had a tire machine which he wanted to use.

The tire machine and air compressor that went with the tire machine was a Coates 10-10 machine that had been moved to the barn from the shop that Billy formerly had in Phoenixville. Weaver pulled the car partly into the door, jacked it up and removed the right tire and wheeled it over to the tire machine. Weaver then proceeded to take the other tire off. (86a) Billy put the tire on the tire machine and let the air out of the tire by removing the valve core. (86a)

There being no liquid soap in the receptacle on the machine for lubricating the bead, Billy went to the house to get some liquid soap. When he got back, he put the soap for lubricating the bead on the

tire and started changing the tire. The entire procedure for changing a tire was shown to the jury through a videotape. There was a compressor with two air hoses; one to operate the air wrench which takes a wheel's lugs off and the other to put air in the tire. The hose for putting air in the tire had a regulator which cuts down the air pressure to 60 p.s.i. The procedure is to insert air in spurts and then check the p.s.i. in the tire.

After the tire was on the rim, the tire would be brought to forty pounds p.s.i. so that the bead would seat, then the air is let out so that the valve core can be inserted.

On the day of the accident, Billy had let the air out, put the shrader valve in, which is a valve that keeps the tire from

deflating. He had twenty pounds in the tire, then he pushed the pedal down to put more air in, held it for two to three seconds at which time the tire blew. (91a)

At the time of the explosion, the p.s.i., which is pounds per square inch, was estimated as somewhere between twenty-five to thirty pounds. As a result of the explosion, Bill went in the air and as he went up, he kicked his father in the face, breaking his nose, then he tumbled back on the floor with his head striking the tire machine. The wheel rim because of the restrictive chock remained on the tire machine. (91a)

Plaintiff's injuries in a most summary form consisted of multiple body fractures; injuries to the brain resulting in an epidural hematoma; fractures of both arms;

fracture of the left olecrannon; Bennett's fracture of the right thumb; multiple facial fractures including both eye orbits; numerous facial and body lacerations residual scarring. His treatment required numerous surgical procedures including a craniotomy. He has been beset with seizures and suffered total amnesia of the events immediately prior to and subsequent to the accident.

In plaintiffs' case, Jeffrey Weaver was called and testimony was elicited from him that he had brought the tires to the shop for mounting; that he had removed the wheels from the front of the car; that he had two tires which he had given to Billy Capriola to mount. He saw Billy Capriola put one of the wheels on the tire machine and was then checking the front end of his

car when the explosion occurred.

Weaver played an important part in the trial tactics of the defendant and the pretrial activities of both plaintiffs' counsel and defendant's counsel. The deposition of Jeffrey Weaver had been taken and both sides were fully cognizant of his testimony. Investigation and discovery procedures had identified the Sloads, husband and wife, and Waltz as possible impeaching witnesses based upon purported extrajudicial statements made by Jeffrey Weaver. Supposedly Jeffrey Weaver had gone to the Sload's house the next morning and in the presence of the Sloads and Waltz had said that the tire changing machine had not been in the shop at the time of the changing of the tire but had been brought in after the accident to Billy Capriola.

In his deposition, Weaver unequivocally denied having made such statements. There would have been no purpose of taking the tires to the Capriola's except to utilize the tire changing machine. Plaintiff had filed a Motion In Limine prior to the trial, asking the Court to direct the defendants acting through their counsel to refrain from making mention of this in their opening speech or in their questions, pending a ruling on the Motion In Limine and for a Rule 104(a) of the Federal Rules of Evidence hearing. (40a)

The Court had been requested to subject this matter to inquiry under Rule 104 of the Federal Rules of Evidence to determine whether the quality of the hearsay statements would be permitted under Rule 613(a) of the Federal Rules of Evidence and

also under Rule 403 to weigh the probative value of such hearsay statements as opposed to the obvious prejudice that would ensue. (43a) The Court denied the Motion in Limine without a hearing.[1]

Both sides utilized expert testimony and as expected, it was contradictory. For the plaintiff, Loren J. Forney, a mechanical industrial engineer with years of tire experience, testified that the procedure that had been used for mounting the tire by Billy on a machine was a proper and safe procedure. It was a tubeless radial tire.

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[1] A hearing would have revealed that on at least one material issue, the purported hearsay was utterly false. Plaintiff had available sworn testimony from credible witnesses that the tire machine was in the barn before the accident. One of defendant's witnesses Rychlak had so stated in a statement to the defendant and had seen Weaver's tire on the machine.

(182a) A tubeless tire is a tire which does not require a tube and the air remains in the tire by the grip of the outside of the tire on the rim. (183a)

He examined the tire in question and found that it had broken beads. The broken beads were on the whitewall side of the tire. (188a) On the ends of the broken beads there was vulcanized rubber. (190a) He compared the tire that exploded against an exemplar tire and performed various tests on the exemplar tire. The exemplar tire broke at the splice of the bead wire and there was no vulcanized rubber on the ends. (196a)

His final opinion was that the beads in Exhibit P-52 were definitely broken during the manufacturing process. They were not completely broken, but partially broken

during the molding process (201a). He also opined that a partially broken bead is subject to further breaking through usage and during the procedure of mounting a tire on a rim even with very low pressure will explode.

The second expert for the plaintiff was Dr. Campbell Laird, a Ph.D. in phyical metallurgy whose qualifications were conceded. In summary, his testimony supported plaintiffs' contentions that there was vulcanized rubber on the broken ends (277a-278a) and the condition and configuration of the ends of the wires having become peened and the presence of the rubber in the cup parts formed during fracture (278a-279a) supported an opinion that the bead wires were broken during manufacture. He explained in order to get

rubber to adhere to iron you need a nice fresh surface and coupled with the fact that there is the amount of peening, all this pointed to a very early fracture namely at the time of manufacture.

Jeff Weaver was called by the plaintiffs and he testified that he had brought the vehicle to the Capriola's to change the tire; that he took the one front white side wall tire off. The Capriola's had offered to dismount the tire and mount the new tires for him and that he saw Billy Capriola put the tire on the machine. The defendant did not at that time invoke the procedures of Rule 613(a) of the Federal Rules of Evidence by asking Weaver about the statements purportedly made by him to the Sload's and Frye.

Following the end of the plaintiffs case,

Weaver was called as a witness for the defendant. An offer of proof was requested. (354a) At the offer of proof, counsel for the defendant admitted that the sole purpose for calling Mr. Weaver was in order to impeach him so as to introduce the testimony of Mr. and Mrs. Sload and a Mr. Frye. (354a) Objection was made that Rule 607 does not permit the calling of a witness so that he may be impeached by introducing hearsay evidence that would not otherwise be admissible and that under any circumstances, the Court would have to weigh the probative value of the hearsay statements against the unfair prejudice under Federal Rule of Evidence 403. (356a) The Court permitted the inquiry of Weaver on the grounds that attacks on credibility are always permissible and was

not in any sense an attempt to circumvent the hearsay law and on that basis, he overruled plaintiffs' objection. (359a)

Weaver testified that he had seen Mr. Sload the morning after the accident and had told him about the accident. He also had discussed the accident with Sload on one or more subsequent occasions. (365a) On the other hand, he had no recollection of ever discussing the accident with Joseph Frye. He was storing a Ford tractor on Sload's property. (366a) He denied telling Mr. Sload the following morning that he, Weaver, was attempting to mount the tire in question and it being a tubeless radial tire, that he was having some difficulty in getting the tire to properly bead. (367a) He denied telling Mr. Sload that Billy Capriola observed what

Weaver was doing and that Billy became impatient, that he took the tire away Weaver and over-inflated it with full unregulated line pressure. (367a) He denied that he had told Mr. Sload the following day that someone had made the decision on the night of the accident to make it look better by bringing into the Capriola's the tire changing equipment that was not there when the accident happened. (368a) He denied telling Mr. Sload the morning after the accident that as of that moment in time, the Capriola's were talking about commencing a lawsuit. (369a) He denied telling Mr. Sload "if I stick to that story, Billy will take care of me". (369a) In addition to being hearsay, counsel for the plaintiff pointed out that 613(a) had not been complied with. Weaver

said that he had merely told Sload that during the mounting of the tire, it exploded.

He was asked, did he know of any reason why Mr. Sload would have any reason other than to be totally candid in describing his relationships with you. This was objected to and overruled. Over objection, he was asked can you think of any reason why Mr. Sload should be anything other than totally truthful in describing to these ladies and gentlemen of the jury his past relationship with you. That was objected to and overruled.

On cross-examination of Weaver by plaintiffs' counsel, he reiterated that there was a tire machine at the time the tire was being dismounted and mounted and that he had never seen anybody dismount a

tire with hand irons.

Mr. Sload was then called to testify as a witness over objection. (391a) Mr. Sload testified that Jeff Weaver said he was at Billy Capriola's; they were mounting two tires for his Monte Carlo; Jeff said that he couldn't get the tires to bead up on the rims and he was aggravated. Billy Capriola came over and took the air hose from him, put it on the valve stem of the rim with full line pressure, and over-inflated the tire and that is the way he was hurt. Weaver also said that they were going to get a tire machine from Ralph Capriola's shop and bring it to the shop that night so it looked like everything was the way it was supposed to be safetywise. They were going to bring suit against B. F. Goodrich Tire Company. Sload then said he

got into a pretty heated argument with Weaver and told him that if he did start any such proceeding that he, Sload, would do what he had to do and come forward and tell what Weaver had told him, Sload, that morning of what really happened. (394a)

On cross-examination, inquiry was made of how a Mr. Failor, a representative of Goodrich, first contacted Sload. Mr. Sload's version was that it was an accidental meeting, Joseph Frye had made arrangements to meet Mr. Failor for an interview at a half-way point at a garage that Sload owned on September 26, 1986. (396a) He admitted he didn't know what equipment was in Billy Capriola's shop. (401a) He admitted that he never reported Weaver's comments to B. F. Goodrich or to the District Attorney, even though he

believed the story Jeff Weaver was telling him. (402a) He testified that if he believed the story, he would have to assume that Jeff Weaver was party to a crime. He did not know why Jeff Weaver, as a party to a crime would confide such participation to him. He admitted that Jeff Weaver had never admitted to any other crimes to him. (403a)

He was asked why Mr. Failor would tell him that he had never heard of Sload, before that date of the meeting at the garage in late September, when as of June 18, 1986, defendant's counsel for Goodrich knew that Sload had been interviewed as to the same allegations.

Joseph Frye's testimony was also based on Weaver's alleged confession of perfidy but with less detail than that of Sload. He

said that a few days after the accident, Weaver told him they were changing the tire on the car at the time it exploded and that there was no machine in the shop that night and they were going to move one in and he did not know from where. (417a) The purpose of moving the machine in was to make the accident look real as if it really happened on the machine. (417a) On cross-examination, he admitted he had never changed a passenger tire except on a tire changing machine and he had never known anyone else to do it. He never asked Jeff Weaver how did you get the tire off if there was no tire changing machine. (419a) He didn't know any reason why Jeff Weaver would have confessed to a crime. His testimony was that a Mr. Failor came to see him on October 1, 1986 because he had been

the original owner of the car. It was only then that he told Failor about what Weaver had told him. (421a)

Karen Sload was then called to testify. She said she heard Jeff Weaver say that they were inflating a tire and that the rim blew off the tire and hit Bill in the face and that Bill was taken to the hospital and then taken to another hospital in Philly, and that they were going to make an effort to get a tire changing machine into the shop so they would have a suit against the company. (425a) She said at the time she didn't even know what brand the tire was because Billy was so severely injured. The cross-examination of Mrs. Sload demonstrated inconsistencies with Mr. Sload and required her to have Weaver saying they were going to bring a machine in and a

later conversation that they had actually brought a machine in. (430a)

The testimony of Mark Rychlak was also objected to and overruled. (438a) Rychlak testified that he purportedly overheard a conversation between William Capriola, Sr., Mike Sharpless and Ralph Capriola that a tire was on the ground and it had direct air running to it with no air chuck. (441a)

Rychlak also testified he was present prior to the accident at the very time Jeff Weaver pulled up in his Monte Carlo and that he saw him take the tires out. There was a tire machine in the barn and the tire was on the tire machine when he left. He admitted that he had been told by Ralph Capriola to go packing, though he denied that this meant he was being fired. He did admit that he didn't work for Ralph

Capriola after that. (449a) He admitted that everytime he had been in the Capriola shop before the accident, the Coates tire changer had been there and at all times before the accident. (450a)

Three experts testified for B. F. Goodrich Tire Company. A fair summary of their testimony was that the tire was not defective, that there was no bead failure and that the forces were not consistent with plaintiffs' case (614a). One of the experts had testified that beads could not break in the manufacture was confronted with prior testimony that in another matter, he admitted he had testified differently. (629a)

Rebuttal evidence was permitted as to the presence of the tire changing machine on the premises prior to the accident. The

witnesses included a Chief of Police, an individual who sold supplies to Capriola and who had been in and out of the shop. (657a) Rebuttal witnesses were permitted denying any conversation between William Capriola, Sr. and Rychlak and also rebuttal testimony from William Capriola, Sr. himself.

A jury, in answers to interrogatories, found that the tire was not defective when it left the control of the defendant. Plaintiffs' Motion for a New Trial was timely filed and upon its denial, appeal was timely taken to the Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE PETITION

I.

There is a direct conflict between the decision of the Court of Appeals for the Third Circuit and the decisions of other Courts of Appeals on the identical issue

that Rule 607 of the Federal Rules of Evidence does not permit a witness to be called for the sole purpose of being a conduit for inadmissible hearsay evidence.

In the Fifth Circuit this was so held in Whitehurst v. Wright, 592 F.2d 834, 839 (5th Cir. 1979).

See also United States v. Miller, 664 F.2d 94, 97 (5th Cir. 1981), cert. denied, 459 U.S. 854, 103 S.Ct. 121, 74 L.Ed. 2d 106; United States v. DeLillo, 620 F.2d 939, 946 (2d Cir. 1980), cert. denied, 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed. 2d 41 (1980); United States v. Rogers, 549 F.2d 490, 497 (8t Cir. 1976), cert. denied, 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed. 2d 229 (1977); United States v. Morland, 531 F.2d 183, 190 (4th Cir. 1975). The Court of Appeals for the Third Circuit had before in a criminal case similarly held that a witness may not be called for the purpose

of circumventing the Hearsay Rule by means of Rule 607, namely United States v. Sebetich, 776 F.2d 412, 429 (3d Cir. 1985).

This issue has been hotly debated by two prominent commentators on evidence. In The Handbook of Federal Evidence by Graham and a Law Review article by Graham entitled "Reply to Weinstein's Evidence", 55 Texas Law Review, 573 (1977), Graham militated against utilizing Rule 607 as a vehicle to permit hearsay evidence to be brought before the jury.

As Graham pointed out, a problem under Rule 607 arises when a party seeks to impeach his own witness with a prior inconsistent statement which is not substantively admissible (see F.R.E. 801(d)(i)). According to Graham, such impeachment should be prohibited absent a

showing of "surprise" and "affirmative damage" by the proponent of the evidence:

> "With respect to impeachment of a party's own witness with a prior inconsistent statement not substantively admissible, in the absence of both surprise and affirmative damage impeachment of one's own witness is inappropriate. If the witness does not give affirmatively damaging testimony, i.e., testimony of positive aid to the adversary, the party simply does not need to attack his credibility. If the witness testimony does not surprise the party, the litigant should not be permitted to impeach his testimony by placing before the jury the witness' prior statement because he could have refrained from eliciting the statment he seeks to impeach. The requirement of surprise would prevent the party from consciously introducing affirmatively damaging testimony under the only circumstances in which he would do so - when the potential effect on the jury of the prior inconsistent statement outweighs the affirmatively damaging effect of the elicited testimony. Graham at 422, 423 (footnote omitted)."

Judge Weinstein, as a commentator on the

Federal Rules of Evidence,[2] had opted for a less inflexible approach. Weinstein counselled the use of Rule of Evidence Number 403 and a weighing by the trial court of the probative effect against the prejudicial, or even potentially prejudicial effect before exclusion.

The practice of the trial court did not follow either the Graham Rule, which had been adopted by the various courts of appeals of this country, or the Rule 403 appoach favored by Weinstein. The record is barren of any weighing by the Court. A few expressions utilized by the Court simply exploited the tag line that the Court was permitting the receipt of the testimony to test credibility. It is

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[2] 3 Weinstein & Berger, Evidence Paragraph 607[5] (pp. 607-79 to 607-81)

submitted that that was hardly an excuse for even the fair weighing that Weinstein envisions.

Reversal for improper application of Rule 403 while possible is rare and appellate courts rarely second guess trial courts at balancing relevance against prejudice, yet in Adams v. Providence and Worchester Co., 721 F.2d 870, 872 (1st Cir. 1982) cert. denied 466 U.S. 973 104 S.Ct. 2349, 80 L.Ed. 2d 822 (1984)the court weighed a dubious admission by the railroad that a railroad employee was disabled from working and as such admitted it into evidence despite its prejudicial effect. The Appellate Court reversed the trial judge because the prejudice outweighed any probative value.

United States v. Long, 574 F.2d 761, 766

(3rd Cir. 1978) cert. denied, 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed. 2d 657 (1978), says that where an objection does invoke Rule 403 the trial judge should record his balancing analysis to the extent that his exercise of discretion may be fairly reviewed on appeal. When the trial court fails to undertake the articulated balancing that Rule 403 would seem to require, the courts have taken two paths. The courts have some time looked to an implicit background for the requisite balancing. United States v. Provenzano, 620 F.2d 985, 1003, cert. denied 449 U.S. 889, 101 S. Ct. 267, 66 L.Ed. 2d 129 (1980), or the appellate court chooses to examine the record itself.

There is nothing in this record that the court ever did any of the requisite

balancing before admitting the Sload and Frye testimony. As part of the plaintiff's case, Weaver was only a link in the history of the tires as they reached the Capriola shop. He did not see the accident. His testimony as to the tire machine being present was at best, inferential and that fact was corroborated by witness after witness.

An analysis properly made would see that attack on the credibility of Weaver has no probative value, it doesn't meet the fulcrum of the issues involved. Instead, the attack on Weaver's credibility, flawed as it may be, was designed for the sole purpose of besmirching the Capriolas with the imputation of a crime.

Under the Circuit Court's decision, the need for a Rule 403 balancing is eliminated

by a limiting instruction.

The Court of Appeals for the Third Circuit held:

> "The challenged statements were not offered 'to prove the truth of the matter asserted,' but for the sole purpose of suggesting that Capriola Sr. and Weaver are prone to tell varying stories."
>
> . . .
>
> "The trial judge clearly and succinctly issued a limiting instruction to the jury which warned about the non-factual nature of the lay testimony. We find no error in the admission of the testimony."

In an excellent student note on Rule 607, 28 William & Mary Law Review 295, which invites attribution, it was pointed out that Congress rejected incorporating inconsistent statements as exceptions to the hearsay rule and thus restricted any substantive use.

See United States v. Ragghianti, 560 F.2d 1376, 1380-81 (9th Cir. 1977), in which the

Court said:

> "While it does not necessarily follow that every one of the Federal Rules of Evidence is a 'specific command of Congress' so that a violation of one requires reversal unless 'harmless beyond a reasonable doubt,' Kotteakos v. United STates, 328 U.S. 750, 764-65, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), the value of prior cases holding admissible for substantive purposes such unsworn hearsay statements has surely been weakened by the codification of 801(d)(1)(A) into the Federal Rules of Evidence. Even before the enactment of the Federal Rules of Evidence into law, the orthodox hearsay rule rejected the use of an unsworn statement made out of court as substantive evidence in a trial. Congress has now spoken to the issue and Congress, not the court, has the final say."
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> . . .
>
> "See also, Notes of the Advisory Committee on Proposed Rule 801, reprinted in 28 U.S.C.A. Rules of Evidence at 527-31; Reports of the Senate and House Committees on the Judiciary and the Conference Report, 4 U.S. Code Cong. & Admin. News 1974, 93d Cong. 2d Sess. at 7062-63, 7086-87, 7104; 4 Weinstein's

Evidence 801-1-801-40, 801-71-801-98 (1975)."

What is at stake is the question of using impeachment as a subterfuge in the hope that a jury will consider the statement's substance in its deliberative process. The fallacy of the limiting instruction is well known. Counsel engages in subterfuge because the evidence he wants to present to the jury he cannot otherwise introduce.

In the instant case, the deposition of Weaver, the statements taken from Weaver all denied the work product of Mr. Failor who had organized this litany of conflicting testimonies, including the imaginary midnight advent of the tire changing machine. The calling of Weaver as a defendant's witness was patent subterfuge.

It is not changed, by the fact that plaintiff also called Weaver. Whether the defendant could have impeached Weaver in the limited offer made in the plaintiffs' case is not before this Court. It was never done. If it were possible, it was opportunity lost.

The crucial issue is that there was no effort to consider the issue of subterfuge or weigh the probative effect against the obvious prejudice. It is clear that the Court of Appeals ratifies the action of the trial court in misapplying Rules 607 and 613(a) in the assumption that a limiting instruction permits the trial court to abdicate its responsibilities.

As to limiting instructions, Justice Jackson in Krulewitch v. United States, 336 U.S. 440, 453, 93 L.Ed. 2d 790 (1949), 69

S.Ct. 716, said:

> "The naive assumption that prejducial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."
> (citations omitted)

It is particularly unrealistic to expect effective execution of the "mental gymnastic" required by limiting instructions, Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.) (Learned Hand, J.) cert. denied 285 U.S. 556, 52 S.Ct. 457, 76 L.Ed. 945 (1932). Plaintiff was forced to dig deeply into the motivations of the Sloads and Frye and in a different context, Rychlak.[3] This is the danger of extraneous issues permitted to be introduced into the stream of fact finding.

Defendants sought to establish that

---

[3]Rychlak had been fired by Capriola's uncle.

Sloads and Weaver were still friends; that Sload still permitted Weaver to park his truck on Sloads' premises. All this became dross thrown on the scales of justice. Plaintiff was dragged from the important task of establishing a defective tire to defending Weaver and his friendship with Sload.

What cleansing action is afforded by a bare bones limiting instruction is dubious. It admits that there is no probative value in determining the issues of the case and does nothing to remove the stain that somehow and somewhere a crime was committed. In fact, the limiting instruction makes the credibility of Weaver a crucial factor. A lay jury does not have the sophistication to appreciate the subtleties which must ensue.

The prejudice of Rychlak's testimony is harder to weight. It had limited probative effect because it made little difference whether the tire was on the machine or not and hardly reached the basic issue of whether the tire was defective. In fact Rychlak, in some respects, bolstered the plaintiffs' case by establishing the presence of the machine before the accident and seeing the Weaver tire on the machine and admitting that there would be no purpose for taking a tire off once it was on the machine to fill the tire with air.

However, a trial judge exercising his duty under Rule 104 and doing the weighing that is required of Rule 403, would have seen its lack of probative weight and the potential for confusion.

There can be no argument of an implicit

weighing by the Court. The Motion for a New Trial charged the Court with this lack of weighing. This charge deserved an explanation. None was forthcoming. The Court after holding the matter for over three months, simply denied the Motion with no Opinion.

A fair application of Rule 607 would have eliminated this highly prejudicial hearsay without the need for any weighing. By sanctioning the action of the trial court, the Court of Appeals for the Third Circuit has issued a carte blanche to permit the dangerous subterfuge of calling a witness solely for the purpose of inviting hearsay testimony which is contrary to the will of Congress.

II.

Petitioner/plaintiff is not accorded due process when Appellate Court incorrectly

found that plaintiff had not preserved violation of F.R.E. 613(a) for appeal and refused to rectify when error was called to Court's attention.

The panel found the plaintiff had not preserved for appeal his particular objection, that the foundation requirement of Fed. R. Evid. 613(a) was not complied with in the cross-examination of Capriola, Sr. In stating that this particular objection had not been preserved for appeal, the panel stated that the plaintiff had not raised an objection when the issue arose at trial. This statement is incorrect. The precise pages of the record where plaintiffs' counsel repeatedly argued that a foundation was lacking under 613(a) are found at pages 434a to 438a of the record, and set forth as an appendix.

The issue was raised during a demand for an offer of proof. Plaintiffs' counsel

objected that the proffered statement was only a snippet from a much larger statement which had been blanked out. Plaintiffs' counsel made it very clear that he wanted the whole statement. The Court insisted that he was entitled only to the snippet of two lines from a whole page. The fallacy of the position of the Court was that what remained on that undisclosed page could very well have modified, reversed, explained, or disclosed an alternative. It was without any basis under Rule 613(a) to deny the whole statement to counsel. It was raised in the Motion for a New Trial. It is set forth at paragraph 3(j) of Plaintiffs' Motion for a New Trial. (723a) See appendix at page 18a.

The panel of the Court of Appeals was asked to reconsider its position. The

Petition for Rehearing addressed to the panel of the Court called attention to the error by the panel in its Opinion and cited chapter and verse that objection was timely made and pursued. The Court of Appeals in the federal system of justice, absent this resort by petition for certiorari, is a court of last resort. The panel's refusal to recognize its error and to confront an issue fairly made, it is submitted, is a denial of due process.

The constitutional right by the plaintiffs to have their case fairly considered at the appellate level deprives those plaintiffs of basic constitutional privileges.

This complex case with these important legal issues was not afforded an oral argument albeit recognizing the demands of

judicial economy, judicial economy should never be permitted to shortchange a party litigant who has raised bona fide serious legal issues requiring of the Court consideration of those legal issues.

It is respectfully submitted that judicial economy has insidiously invaded a deliberative process that should be part of appellate review. A long trial with serious legal issues deserves an oral argument to which these issues could have been addressed and misreadings of the record by the panel be avoided. A fair appellate review is an integral part of due process.

The Supreme Court in Provident Tradesman Bank and Trust Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed. 936 (1968), granted certiorari because the Court of

Appeals for the Third Circuit eviscerated the thrust of Federal Rule of Civil Procedure 19 by a misplaced concept that jurisdiction would be lacking absent the joinder of a so-called indispensible party. The Supreme Court acted in support of its Rule 17.1(c) that the court below has rendered a decision in conflict with the applicable decisions of the Supreme Court and frustrated the rule-making reach of this Court.

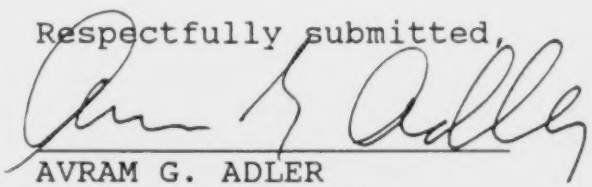
The recalcitrance of the Court of Appeals for the Third Circuit in Provident Tradesman Bank & Trust Co. v. Patterson, supra, in which the Court of Appeals said that Rule 19 was beyond the reach of the right of the Supreme Court to fashion such a rule calls for the same attention from this court to restore appellate due

process. The pointing out of error on the part of the panel with chapter and verse cited, mandated a response and a determination by the panel of the legal issue involved.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Third Circuit.

Respectfully submitted,



AVRAM G. ADLER
Counsel of Record

ADLER & KOPS
Attorney for Petitioner

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 85-7485

WILLIAM A. CAPRIOLA, JR. and BRYN CAPRIOLA, Husband/Wife

v.

B. F. GOODRICH CO.

ORDER

AND NOW, this 19th day of May, 1987, upon consideration of plaintiffs' motion for a new trial and defendant's answer it is hereby Ordered that plaintiffs' motion is DENIED.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer
Clarence C. Newcomer

APPENDIX "B"

2A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1330

WILLIAM A. CAPRIOLA, JR., and
BRYN G. CAPRIOLA, husband/wife
Appellants

v.

B. F. GOODRICH COMPANY

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 85-7485)
District Judge: Clarence C. Newcomer

Submitted Under Third Circuit Rule 12(6)

December 14, 1987

Before: SLOVITER and COWEN, Circuit Judges and DEBEVOISE, District Judge*

(Filed: December 16,1987)

MEMORANDUM OPINION

*Hon. Dickinson R. Debevoise, United States District Court for the District of New Jersey, sitting by designation.

SLOVITER, Circuit Judge.

Plaintiff William A. Capriola, Jr. appeals from the denial of his motion for a new trial following an adverse jury verdict in his product liability action against defendant B. F. Goodrich tried in federal court on the basis of diversity.

Plaintiff's suit was based on injuries he incurred following the explosion of a B. F. Goodrich tire, which he claimed he was changing on a machine for a friend, in his father's garage which housed some automobile mechanic equipment. After a lengthy trial, the jury found that the

product in question was not defective and, thus, found that the defendant not liable to plaintiff for his extensive injuries. Plaintiff bases his appeal on his claim of three evidentiary errors committed by the district court.

It was plaintiff's position that the tire exploded because the protective "beads" were broken during the manufacturing process. Plaintiff presented testimony in two forms -- eyewitnesses and expert. The two eyewitnesses to the accident were plaintiff's father, William A. Capriola, Sr., and plaintiff's friend who owned the tire, Jeffrey Weaver. Capriola Sr. basically testified that he watched plaintiff use the proper procedures to change the tire on the machine when the tire suddenly exploded and threw his son in the air. Weaver testified that he,

indeed, brought the tire to Capriola Sr.'s garage for changing, but that he was working on his car when he heard the explosion and, therefore, he only saw Capriola Jr. "flying up in the air." See App. at 313a. He also testified that, after the accident, he saw that the tire was on the floor and the rim was still on the machine.

Plaintiff's experts, Laren J. Forney, an expert in tire failures and explosions, and Campbell Laird, an expert in metallurgy and fracture, provided extensive testimony regarding the beading, seating and changing of all sorts of tires.

B. F. Goodrich presented two of its own experts to attempt to refute the allegations of defect in the manufacturing of the tire. These experts also testified to their opinion that the "mode of the

accident" was an incorrect procedure on plaintiff's part. In addition, defendant presented witnesses who testified to inconsistent subsequent statements made by the two eyewitnesses. One witness testified that the day after the accident Weaver said he saw the whole accident and saw plaintiff over-inflate the tire. See App. at 394a. Another witness testified that Capriola Sr. told him that the tire was on the ground and had direct air running to it. See App. at 441a. Finally, yet another witness testified that a few days after the accident Weaver told him that there wasn't even a tire machine in the shop on the night of the accident. See App. at 417a.

Plaintiff contends that Rule 607 does not permit a witness to be called for the sole purpose of being a conduit for inadmisible

hearsay evidence. The district court refused to let the evidence come in as substantive evidence under Fed. R. Evid. 803(24), and elected instead to give a limiting instruction that this evidence was to be used only to ascertain the credibility of plaintiffs' witnesses. Hearsay is defined by the Federal Rules of Evidence as a "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The challenged statements were not offered "to prove the truth of the matter asserted," but for the sole purpose of suggesting that Capriola Sr. and Weaver are prone to tell varying stories. In fact, the record reflects that the defendant tried to have these statements accepted for their substantive

value, but the district court would only authorize their use for credibility purposes. Fed. R. Evid. 613(b) authorizes the admission of a prior inconsistent statement by a witness. The trial judge clearly and succinctly issued a limiting instruction to the jury which warned about the non-factual nature of the lay testimony. We find no error in the admission of the testimony.

Plaintiff contends that the foundation requirement of Fed. R. Evid. 613(a) was not complied with in the cross-examination of Capriola Sr. He argues that "defendant's counsel refused to furnish the complete statement and the proper foundation was never laid." Appellant's brief at 41. Plaintiff fails to show that he raised this objection when the issue arose at trial. Nor did he note a Rule 613(a) error in his

motion for a new trial. Accordingly, this partiuclar objection has not been preserved for appeal.

Appellant also argues that a Rule 104 proceeding was mandated to pass on the admissibility of the evidence. The district court did look at the probative value/prejudicial effect of the proffered "hearsay" evidence. That is how it came to the conclusion that a limiting instruction was necesssary. Moreover, despite the assertions of the plaintiff on appeal, the credibility of all witnesses in court has significant probative value.

Finally, the Rule 104(c) "outside-the-jury" proceeding is only mandated in proceedings to determine the admissibility of confessions. See Fed. R. Evid. 104(c). With all other preliminary matters, the decision to hold proceedings out of the

hearing of the jury is left to the trial judge's discretion. We find no abuse of that discretion here.

Finally, plaintiff argues that the district court abused its discretion in refusing to permit plaintiff's proposed rebuttal regarding tire explosivity. Plaintiff offered its expert Laird to rebut defendant's explosivity evidence. The trial judge found that Laird was not qualified in the area for which his testimony was offered. A trial judge exercises broad discretion in accepting or denying rebuttal testimony. Laird was offered by the plaintiff only as an expert in metallurgy and fracture. He could have been offered at that time as an expert in other areas, but the plaintiff chose only the above two. Given this vast opportunity to have his witness qualified in any field

without objection from the defendant, the plaintiff can not later recapture this foregone opportunity by claiming that his qualifiation procedure was "cut short" by the defendant's concession on the matter. The judge specifically asked if Laird was to be qualified in any other areas. App. at 274a. Plaintiff's other expert, Forney, was explicitly qualified in tire explosions and failures. Plaintiff did offer some evidence explosivity in his case-in-chief via Forney. Plaintiff, however, failed to offer him on rebuttal.

We therefore hold that the district court did not abuse its discretion in refusing to permit the rebuttal testimony offered by plaintiff.

For the foregoing reasons, we will affirm the order of the district court denying a new trial.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter

Circuit Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1330

WILLIAM A. CAPRIOLA, JR., and
BRYN G. CAPRIOLA, husband/wife
Appellants

v.

B. F. GOODRICH COMPANY

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, Circuit Judges, and DEBEVOISE*, District Judge

ORDER

The petition for rehearing filed by Appellants, WILLIAM A. CAPRIOLA, JR., and BRYN G. CAPRIOLA, husband/wife in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/Dolores K. Sloviter
Judge

DATED: January 12, 1988

*Hon. Dickinson R. Debevoise, U. S. District Court for the District of New Jersey, sitting by designation, on rehearing before original panel only.

APPENDIX "D"

EXERCEPTS OF TRIAL TRANSCRIPT (PP. 106-109)

MR. ADLER: I object to Rychlak's testimony as to what he overheard between Bill Capriola, Sr., Ralph Capriola and the other gentleman whose name was mentioned.

MR. BROGAN: Mike Sharpless or Mark.

MR. ADLER: Mike Sharpless.

THE COURT: In other words, testimony in a similar vein presumably of the type we have already heard.

MR. ADLER: Yes, your Honor.

THE COURT: All right.

MR. ADLER: Except that it differs in several important regards. Number one, --

THE COURT: Do you object to anything else?

MR. ADLER: I -- I --

THE COURT: I want to get all your objections now once and for all. Then you may say a word about them.

MR. ADLER: Okay. I object to the use of putting this witness on to introduce hearsay testimony pursuant to 607, similar to what I previously argued and for which I have previously briefed your Honor.

I am objecting also under 613 in that the

statement given to me under 613(a) differs sharply from the proffered offer. And I also object because it is only a snippet from --

THE COURT: Why does it differ from the proffer?

. . .

MR. ADLER: Well, I want the whole statement, your Honor. If I am going to cross-examine, I don't --

THE COURT: You don't have to argue that. You have got it.

MR. ADLER: I don't have the whole statement.

THE COURT: You have got the statement.

MR. ADLER: This is a paragraph taken out of a statement.

THE COURT: You have the statement that he is relying on. I think you are entitled to that. If there is any more, then he can be precluded from presenting it. If he has not either given you an outline in writing or told you about it, one or the other, in the event this was not a written statement, he doesn't have to give you a written statement, he just simply has to inform you. I think the Act says, or the rule says "disclose," doesn't it?

Yes.

The statement need not be shown, nor its

contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

That is what he is doing.

MR. ADLER: I think I am entitled to the context, your Honor.

THE COURT: Well, if he hasn't given it to you, then he will have some problems with it. Overruled.

. . .

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 85-7485

WILLIAM A. CAPRIOLA, JR.
and BRYN CAPRIOLA, h/w

v.

B. F. GOODRICH CO.

PLAINTIFFS' MOTION FOR A NEW TRIAL

AND NOW COMES PLAINTIFFS, WILLIAM A. CAPRIOLA, JR. and BRYN CAPRIOLA, and moves this Honorable Court for a New Trial and in support thereof avers the following reasons:

3. The Honorable Court erred:

(j) In permitting the testimony of Mr. Mark Rychlak for the purpose of introducing hearsay testimony to impeach William Capriola, Sr. without proper and adequate foundation.